Filed 11/18/16 Patel v. Clocktower Inn CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BHIKHUBHAI C. PATEL, Plaintiff and Respondent, v. CLOCKTOWER INN, INC. et al., Defendants and Appellants. BHARAT PATEL, Cross-Defendant and Respondent.	B263528 (Los Angeles County Super. Ct. No. YC067782)
CLOCKTOWER INN, INC., Plaintiff and Appellant, v. BHIKHUBHAI C. PATEL et al., Defendants and Respondents.	B263528 (Los Angeles County Super. Ct. No. YC068729)

Appeal from a judgment of the Superior Court of the County of Los Angeles, Stuart Rice, Judge. Affirmed.

Law Office of Kathryn M. Davis, Kathryn M. Davis, for Defendants and Appellants Suboth V. Patel, Anil V. Patel, and Kiran Patel and Defendant, Cross-Complainant, and Appellant Suresh Patel.

Robert M. Orr for Defendant, Plaintiff, and Respondent Clocktower Inn, Inc.

AlveradoSmith, Kevin A. Day and Jacob M. Clark for Plaintiff, Defendant, and Respondent Bhikhubai C. Patel and Cross-Defendant, Defendant, and Respondent Bharat Patel.

Plaintiff Bhikhubhai C. Patel (BC) sued defendants—his son, Suresh Patel, his nephews, Suboth, Anil, and Kiran Patel, and a corporation owned by BC and his nephews—seeking, inter alia, a declaration that BC owned 50 percent of the shares of the corporation. In response, Suresh Patel cross-complained against his brother, Bharat Patel, for intentionally interfering with an alleged contract between Suresh and BC under which BC allegedly gifted certain of his shares in the corporation to Suresh. In a separate action that was consolidated with BC's action, the corporation sued BC and Bharat for allegedly converting certain monies belonging to the corporation.

On appeal, defendants raise multiple challenges to the judgment entered in favor of BC on his complaint and against Suresh and the corporation on the cross-complaint and the conversion complaint. We hold that none of the challenges raised on appeal has merit and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Statement of Decision

1. The Parties[2]

This litigation involved an extended-family business venture to develop and operate a hotel in Torrance. The patriarch of the family was BC, the father of Bharat and Suresh. Suboth was a cousin of Bharat and Suresh. Clocktower Inn, Inc. (Clocktower) was the owner of the hotel in Torrance developed and operated by the Patel extended family. Two additional Patels were involved only because of their stock ownership in Clocktower: Anil and Kiran, brothers of Suboth and cousins of Bharat and Suresh. In all, seven family members and the corporation were involved in the dispute over the ownership and operation of Clocktower.

---

[1] The parties stipulated to have this action determined by a referee appointed pursuant to Code of Civil Procedure section 638, subdivision (a) (section 638(a)). Following trial, the referee issued a statement of decision and, in response to defendants' requests for findings of fact and conclusions of law, a supplement to the statement of decision. Defendants concede in their reply brief that they are not challenging the sufficiency of the evidence in support of the referee's findings as contained in those two documents. Therefore, this factual and procedural background is based on the procedural history and factual findings set forth in those documents.

[2] Because all of the individual parties have the same surname, each will be referred to by his first name, except BC, who will be referred to by his first two initials.

2. Pleadings and Reference

The referee was appointed under section 638(a) to determine the issues framed by three pleadings:

(i) The second amended complaint in case number YC067782, *Bhikhubhai C. Patel v. Clocktower Inn, Inc.*, *Suresh Patel, Suboth Patel, Anil Patel, and Kiran Patel*, originally pleaded six causes of action: declaratory relief; conversion; breach of fiduciary duty; constructive trust; unjust enrichment; and accounting. During the course of the evidentiary hearing, the second through sixth causes of action were dismissed, leaving only the declaratory relief cause of action to be adjudicated. The declaratory relief cause of action sought a declaration clarifying the ownership of Clocktower's stock (both who owned stock and how many shares each party owned). This portion of the case was referred to as the stock ownership case.

(ii) Suresh filed a cross-complaint in case number YC067782, *Suresh Patel v. Bharat Patel.* The cross-complaint consisted of a single cause of action for intentional interference with contractual relations that also raised the issue of stock ownership. This portion of the case was resolved by resolution of the stock ownership case, as explained below.

(iii) In consolidated case number YC068729*, Clocktower Inn, Inc. v. Bhikhubhai C. Patel and Bharat Patel*, Clocktower alleged that BC and Bharat converted certain monies belonging to Clocktower. This case was referred to as the conversion case.

3. Background Facts

The Patel family immigrated from India to the United Kingdom, and then from the United Kingdom to the United States. All members of the family spoke Gujarati, an Indian

dialect. Bharat, Suresh, and Suboth were all fully literate in English. BC could speak some English, but at the evidentiary hearing he testified mostly through a Gujarati interpreter.

Bharat and Suboth were both articulate and knowledgeable about business matters. Bharat had a degree in business and real estate. Suresh was also articulate and intelligent, but apparently spent most of his efforts in hands-on type of work. For example, he operated a machine shop not involved in these proceedings, and testified that he worked on supervising the construction of the Clocktower hotel.

BC was in his late seventies and had little formal education. BC did not read English, but instead relied upon his son Bharat to explain business matters to him in Gujarati.

The corporation, Clocktower, was run informally. Formal corporate procedures were rarely used. Business decisions were often made orally and without formal board of directors meetings. For the most part, Clocktower was managed by Bharat.

4. Stock Ownership Case

Twenty-four shares of Clocktower stock were initially issued. Of those 24 shares, nine were initially issued to BC. By way of purchase from another shareholder departing the business, BC expanded his stock ownership to 12.

At the time BC increased the number of shares he owned, the ownership of the Clocktower stock was not in dispute. Before any dispute arose, the stock was allocated as follows: BC: twelve shares; Anil: four shares; Kiran: four shares; and Suboth: four shares.

The evidence reflected that as BC aged, there were discussions regarding his testamentary intent. In the course of

these discussions, BC either stated or was understood to intend that upon his death his Clocktower stock would pass to his two sons, Bharat and Suresh. Apparently Bharat and Suresh were unwilling to await BC's death, or wished to solidify their claim to at least some of the Clocktower stock in advance of BC's death. Accordingly, instigated primarily by Bharat, arrangements were made to attempt a transfer of some of BC's Clocktower stock to Bharat and Suresh during BC's lifetime.

Exhibit 20 was the minutes of a January 1, 2007, shareholders' meeting that was purportedly held pursuant to signed waivers and a notice of consent. The minutes stated that the shareholders "were informed" at the meeting that BC had agreed to transfer "as a gift" three Clocktower shares to Suresh and three Clocktower shares to Bharat. Based on this information, the minutes stated it was resolved that the company secretary be directed to amend the official records to show that Suresh and Bharat held three shares apiece and that BC's holdings had been reduced from twelve shares to six shares. The minutes also directed the secretary to issue new share certificates reflecting the change in ownership, and directed "the managers of the Company" to take all steps necessary to carry these directives into effect.

As noted above, BC spoke little English and read no English. The evidence was also undisputed that BC never signed the stock transfer certificates necessary to formally transfer six of BC's shares to Suresh and Bharat (three to each). The evidence further preponderated that upon learning from Bharat (in Gujarati) that six of his shares were to be transferred to Bharat and Suresh, BC objected and refused to make the transfer.

By the time of trial, Bharat sided with BC and took the position that he had acted to engineer the transfer of BC's shares to himself and Suresh without authorization from BC. That Bharat did not have BC's authorization was contested, but it was not contested that BC never actually signed the stock transfer certificates. At trial, the issue was characterized as whether Bharat had exercised undue influence over BC and had induced BC to change his mind about making the transfer. The evidence, however, preponderated that BC did not learn that his shares were to be transferred until Bharat explained that to him in Gujarati, and that upon having it explained, he promptly objected and refused to transfer his shares.

Thus, the contention that six of BC's shares were effectively transferred from BC to Bharat and Suresh rested wholly upon the minutes of the exhibit 20 shareholders' meeting reciting that the shareholders "were informed" that BC intended to transfer his shares. No formal transfer document was ever executed by BC. The issue was whether the exhibit 20 minutes alone were sufficient to divest BC of his shares and to effect a transfer to Bharat and Suresh, notwithstanding that BC later declined to sign the stock transfer certificates and even though he could not read English and therefore was not in a position to read or understand the minutes until they were explained in Gujarati by Bharat.

Whatever BC's state of knowledge or intention might have been at the time of the exhibit 20 minutes, the shares were never effectively transferred from BC to Suresh and Bharat. This transfer was expressly stated to be "as a gift." Being gratuitous and without consideration, the intention stated in the minutes could not constitute an enforceable contract. Thus even if, at the

time of the exhibit 20 minutes, it was BC's future intention to transfer Clocktower shares to Bharat and Suresh, no enforceable obligation to do so was created and BC remained free to change his mind until the transfer was completed. BC also remained free to transfer or bequeath his property as he wished, but the uncompleted transfer referenced in exhibit 20 was not sufficient to divest BC of his shares.

Accordingly, declaratory relief was granted that the exhibit 20 minutes did not alter the pre-existing allocation of Clocktower shares. Thus, the allocation remained as stated above.

There was some implication at the evidentiary hearing that Suresh may have relied upon the supposed transfer of stock to him in expending time and work on the Clocktower hotel project. To the extent that Suresh might have a quantum meruit, implied-in-fact contract, or other such claim, it was not raised by the pleadings and evidence on such a claim or its amount was not presented. Hence, no ruling was made on that theoretical claim.

5. Suresh's Cross-Complaint

Suresh's cross-complaint for intentional interference with contractual relations was based on the proposition that Suresh had a contractual right, defined by the exhibit 20 shareholders' meeting minutes, to three shares of Clocktower stock. As noted above, that was not the case. Because Suresh did not have such a contractual right, Suresh did not suffer interference with his contractual rights. Judgment on Suresh's cross-complaint was therefore in favor of cross-defendant Bharat.

Suresh's cross-complaint also alleged that Bharat was able to interfere with Suresh's alleged contractual right to three Clocktower shares due to Bharat's alleged exercise of undue

influence over BC. The issue of whether some remedy was needed to protect BC from undue influence by Bharat, however, was not pleaded. Hence, no ruling was made on such a theoretical claim.

6. Conversion Case

Based upon the incorrect proposition that three shares of Clocktower stock had been transferred to Suresh and three to Bharat, the allocation of Clocktower stock was contended to be as follows: BC: six shares; Anil: four shares; Kiran: four shares; Suboth: four shares; Bharat: three shares; and Suresh: three shares.

Based upon this allocation, the combination of Anil's, Kiran's, Suboth's, and Suresh's shares constituted a majority of fifteen out of twenty-four total issued and outstanding shares. By the actions of this purported majority, Bharat was removed from his managing position with Clocktower. Anil, Kiran, Suresh, and Suboth then took over the management and oversight of the Torrance hotel.

After Bharat and BC filed the stock ownership case seeking a declaration that BC continued to hold twelve shares of Clocktower stock, and that Suresh and Bharat had not been transferred three shares apiece, the conversion case was filed by Clocktower alleging that BC and Bharat had converted monies belonging to Clocktower. In the conversion case, the corporation sought a recovery of the allegedly converted funds from Bharat and BC.

The evidence did preponderate that Bharat, and to a lesser extent BC, withdrew money from Clocktower. In the conversion

case, Clocktower showed sums totaling almost $2 million removed from Clocktower by Bharat and BC.

As noted above, Clocktower was managed for many years (essentially for its total existence) in an informal manner. Not only were corporate formalities not observed, careful records also were not kept. In addition, during Bharat's term of management, the other shareholders did not regularly monitor the financial performance of Clocktower. Hence, alleged discrepancies were not raised at a roughly contemporaneous time when the indefinite accounting might have been more susceptible to clarification. Consequently, the records of Clocktower, including its financial records, were in an incomplete, confused, and uncertain condition. Efforts to reconstruct and analyze the financial operations of the company over the years had not been completely successful. At the same time, Clocktower, as plaintiff in the conversion case, bore the burden of proving the conversion and its amount.

The evidence preponderated that certain funds which Clocktower now contends were taken by Bharat without authorization (e.g., commissions, mark-ups to compensate construction management work, etc.) were most likely either expressly or implicitly authorized. Beyond such items, Clocktower's showing in support of its conversion claim was almost completely focused on the amount of monies removed from Clocktower by Bharat and BC, and not upon the evidence of monies replaced. Yet, in order to establish the damages element of a conversion claim, Clocktower would bear the burden of showing a net loss. In opposition, Bharat and BC presented considerable evidence that offsetting funds most likely equal to or

exceeding any funds improperly removed had been replaced by Bharat and BC.

Not only did Bharat and BC present evidence that they had replaced funds into Clocktower, they also contended that they replaced into Clocktower significantly more than they had taken out. If this is true, then Bharat and BC could conceivably be entitled to a credit of some sort for this infusion of funds. The pleadings, however, did not seek an adjustment of this kind, and exactly how that would be done has not been determined. Bharat, for example, was not a shareholder, as determined above. Hence, Bharat, as a nonshareholder, presumably had no capital account or equivalent account with Clocktower. Nor was it clear how much might be attributable to Bharat as opposed to BC. For reasons of both pleading and proof, no ruling was made regarding accounting for any excess funds which may have been deposited into Clocktower by Bharat and BC.

It was not established that Bharat and BC, on a net basis, converted funds belonging to Clocktower (i.e., it was not established that they took out more than they put in, leaving a deficit). Instead, although the evidence does show that Bharat, and to a lesser extent BC, did withdraw funds from Clocktower on an irregular basis, the evidence did not show that they failed to replace funds at least equal to what they removed.

The evidence preponderated that Clocktower was not damaged by the alleged conversion. Hence, judgment on the conversion case was against Clocktower and in favor of Bharat and BC.

7. Summary of Referee's Rulings

None of BC's shares were transferred to either Suresh or Bharat, with the result that BC continued at all relevant times to be the owner of twelve shares. The holding of Clocktower shares was therefore as follows: BC: twelve shares; Anil: four shares; Kiran: four shares; and Suboth: four shares.

On Suresh's cross-complaint, the judgment was against Suresh and in favor of Bharat.

On the conversion case, Clocktower failed to establish that Bharat and BC removed more money from Clocktower than they replaced into Clocktower. Thus, judgment on the conversion case was against Clocktower and in favor of Bharat and BC.

B. Supplement to Statement of Decision

Following the issuance of the statement of decision, defendants advised that paragraph 7 of the stipulation by which the parties agreed to a judicial reference provided that "[t]he Referee shall issue a written statement of decision *containing findings of fact and conclusions of law* which shall then be presented to the Superior Court . . . for entry as a final . . . judgment . . . ." [Italics added]. This advice was accompanied by a listing of issues on which findings of fact and conclusions of law were requested. The statement of decision covered both the stock ownership case and the conversion case. The requests for findings of fact and conclusions of law also covered both cases.

The requests for findings of fact and conclusions of law relating to the stock ownership case and the referee's responses thereto were as follows:

1. "Was [*Bharat*] . . . *the Real Party in Interest in This Litigation and Is He Barred Under the Doctrine of Unclean Hands?"*

Findings: Bharat was not the real party in interest. Following dismissal of causes of action two through six, the only pending cause of action was the one for declaratory relief specifying how the stock of Clocktower was held. The only dispute presented regarding the holding of Clocktower shares concerned six shares that, before the dispute arose, clearly belonged to BC.

The issue was whether BC had lost ownership of six of his shares. The factual finding was that BC never agreed to convey six of his twelve shares in Clocktower to Bharat and Suresh.

The supposed donees could not accomplish a transfer without the consent of the supposed donor. Since BC never agreed to transfer his six shares, and never executed the share transfer documents that would memorialize such a transfer, no transfer was ever accomplished. Accordingly, the share ownership remained as it was prior to the ineffective attempt to transfer, with BC continuing to own twelve shares.

The question of whether Bharat "is barred under the doctrine of unclean hands" has no bearing on the question of whether BC was involuntarily divested of six of his twelve shares. Hence, the finding was that insofar as the ownership of BC's six shares was concerned, the question of whether Bharat had unclean hands was immaterial.

2. "Is This a Shareholder Derivative Action?"

Findings: This action fairly raised the issue of the ownership of BC's six shares. All interested parties plus

Clocktower were parties to the lawsuit. The issue as to whether the dispute over the ownership of BC's six shares should be characterized as a derivative action in addition to a nonderivative action was immaterial, absent some showing of a violation of due process. Inasmuch as all interested parties were present for trial and had an opportunity to present their cases, there was no due process violation. To the extent that it might be argued that Clocktower itself had no interest in who owned its shares, Clocktower was also present and represented. Hence, the procedural issue raised was of no consequence to the question of whether BC was divested of six of his twelve shares.

> *3. "Was* [*Bharat*] *. . . the Authorized Agent and Attorney in Fact of . . . BC . . . When He Filled Out Exhibit 79*[3] *and Exhibit 20, Both Confirming the Inter Vivos Distribution of the Shares of Clocktower Inc."*

Findings: No. Bharat was not authorized to divest BC of six of his twelve shares in Clocktower. The fact that Bharat caused minutes to be prepared or reported stock ownership incorrectly to lenders did not affect the fact that Bharat was not authorized by BC to divest BC of six of his twelve shares.

---

[3] Exhibit 79 was a loan application filled out by Bharat and submitted to the construction lender for the Torrance hotel. The application stated that Bharat and Suresh each owned 25 percent of Clocktower's stock or six shares each.

4. "What Is the Effect of Exhibit 79 Assuming That [*Bharat*] *. . . Was Going Against BC's Wishes When He Filled It Out and Submitted It to the Bank and Had BC Sign It?"*

Findings: What the total effect of exhibit 79 might be was an issue largely outside the scope of this litigation. The only point of significance to this litigation was that presentation to the bank of an unauthorized form was not a basis on which BC could be divested of six of his twelve Clocktower shares.

Exhibit 79 was properly offered in evidence in an attempt to show that BC did understand that Bharat and Suresh were attempting to obtain BC's six shares, and that BC did authorize and did consent to such a transfer. Such evidence, however, did not preponderate. Instead, the evidence from both sides preponderated that BC relied upon Bharat with respect to business matters, such as what documents to sign. The evidence preponderated that BC relied on Gujarati translations by Bharat regarding business matters generally, and that when Bharat advised BC in Gujarati that Bharat and Suresh were seeking to assume title to BC's six shares, BC objected and refused to consent to the transfer. The evidence was undisputed that BC never signed the stock transfer documents. What Bharat represented to the bank was immaterial to these findings concerning the ownership of BC's six shares.

5. "Is a Principal Legally Responsible for the Fraud of His Agent?"

Findings: This was a hypothetical question having no application to the facts as found in this case. In seeking to divest BC of six of his twelve shares of Clocktower, Bharat was not

acting as BC's agent inasmuch as BC never requested or consented to divestment of six of his twelve shares.

6. "In a Family Corporation, Such As Clocktower, Must All Formalities Regarding the Transfer of Share Certificates Be Maintained?"

Findings: This hypothetical question also had no application to the facts as found in this case. The finding by a preponderance of the evidence was that BC never authorized or consented to transfer of six of his twelve Clocktower shares. The fact that BC never signed any stock transfer documents was one piece of evidence supporting this factual conclusion.

It was not necessary to decide whether there might be some hypothetical set of facts on which it might be found that ownership of stock shares were transferred without signature of stock transfer documents. In the instant case, without signature of such documents, the evidence preponderated that no such transfer had been effected. This finding was sufficient to resolve the issue presented without determining whether a transfer could be effected without signature in some other circumstance.

7. "Assuming That Plaintiff Told [*Bharat*] *in Early January 2007 That He Did Not Want to Make An Inter Vivos Gift of the Shares of Stock in Clocktower, Did* [*Bharat*] *Have an Obligation to Communicate That Decision to Clocktower and to Suresh?"*

Findings: This question was outside the scope of the pleadings in this case. Following dismissal of causes of action two through six, the remaining issue in both the complaint and

the cross-complaint focused on whether BC's six shares had been transferred. What obligation Bharat might have had was not an issue presented for adjudication.

> *8. "Does the Execution by BC . . . on January 30, 2007, of Exhibit 79, and the Presumption That the Contents Thereof Were Constructively or Actually Known by* [*BC*]*, Supersede the Alleged Oral Revocation of the Gift By* [*BC*] *In Early January 2007?*

Findings: The evidence preponderated that BC executed exhibit 79 merely because Bharat advised him to do so. The evidence also preponderated that BC was fluent in Gujarati, but not in English. Assuming that there was a presumption as noted in the question, the presumption was rebutted by the evidence. Moreover, no "oral revocation of the gift" had been found; instead it was found that no gift had ever been made.

> *9. "In the Case At Bar, Do Exhibits 79 and 20 Constitute Written Confirmation of An Inter Vivos Gift of Stock?"*

Findings: No, for the reasons stated above.

10. "Is the Transmission of Exhibit 79 and Exhibit 20 to the Construction Lender with the Intent to Induce Reliance Thereupon, and the Execution by Suresh . . . of a 6 Million Dollar Guarantee of the Clocktower Construction Loan Sufficient to Estop [*BC*] *From Contending That He Did Not Make An Inter Vivos Gift?"*

Findings: No, for the reasons stated above.

11. "Does the Existence of Exhibit 79 and Exhibit 20 Constitute Sufficient Grounds for the Application of Evidence Code Section 623 . . . ?

Findings: No, for the reasons stated above.

12. "Pursuant to Evidence Code Section 622, Is the Fact of the Gift of the Shares to Suresh Conclusively Presumed to Be True By Virtue of Both Exhibits 79 and 20? . . . Each of These Documents Was Prepared By [*Bharat*] *and Signed By BC,* [*Bharat*]*, and* [*Suresh*]*."*

Findings: No, for the reasons stated above.

13. "Does Exhibit 79 Reflect the Gift of 6 Shares of Clocktower to Suresh in Accordance With an Earlier Oral Gift?"

Findings: The contention was that BC made a gift of three shares to Suresh and three shares to Bharat. For the reasons stated above, this contention was rejected.

14. "If Evidence Code Section 622 Applies, Does Exhibit 20 Need to Be Reformed to Conform to the Intent of Exhibit 79?"

Findings: No, for the reasons stated above.

15. "Under Exhibit 79 and Evidence Code Section 622, Is [*BC*] *Presumed to Know That* [*Bharat*] *Had Confirmed An Earlier Oral Gift of Six Shares of Clocktower to Suresh?"*

Findings: The contention was that BC made a gift of three shares to Suresh and three shares to Bharat. For the reasons stated above, this contention was rejected. Thus, there was no finding of "an earlier oral gift of six shares of Clocktower to Suresh" to be confirmed, nor a gift of three shares to Bharat and three shares to Suresh.

The requests for findings of fact and conclusions of law relating to the conversion case and the referee's responses thereto were as follows:

1. "Did Bharat . . . Owe Clocktower a Fiduciary Duty, As a Corporate Officer, During All Relevant Times?"

Clocktower's complaint for conversion was a one-count complaint simply pleading that Bharat and BC converted the property of Clocktower. An element of conversion is proof of damages. The question of whether Bharat owed Clocktower a fiduciary duty has no bearing on this determinative issue.

2. "Did Bharat Admit That He 'Borrowed' $1,356,662.75 From Clocktower?"

As stated in the statement of decision, the determinative issue was whether Bharat took out of Clocktower more than he put into Clocktower. The item of evidence cited was not determinative of this issue.

Requests 3 Through 11.

These requests for findings were similar to those discussed above. The determinative question was whether Clocktower had proven by a preponderance of the evidence that Bharat and BC had taken more funds out of Clocktower than they put into Clocktower. Clocktower's showing on this point focused on the funds taken out, but ignored the evidence of funds put back in. It was consequently not possible to determine that Bharat and BC had taken out any particular amount of net funds.

12. "Are Capital Contributions to a Corporation the Equivalent of, or the Means by Which, Funds Converted From the Corporation Are Repaid?"

Monies paid into Clocktower to replace monies previously "borrowed" from Clocktower would not be creditable to Bharat's or BC's capital account. However, the status of the parties' capital accounts was not an issue that was presented for adjudication.

13. "If BC and/or Bharat Repaid the Converted Monies After They Were Converted, Are Those Individuals Still Liable to the Corporation for the Interest the Corporation Lost While It Was Out of Possession of Its Funds?"

Theoretically yes, but no particular amount was proven, nor was the existence of this type of damage shown since it was not possible to determine that Bharat and BC took out more than they put in.

14. "Does Civil Code [*Section*] *3337 Bar Defendants' Defense To the Conversion Case That They Repaid the Converted Funds with Capital Contributions, or by Paying the Debts of the Corporation?"*

It was not clear what factual finding was sought here. However, as noted above, repaying money would not be a capital contribution, and no such finding was made. Nor was it clear that either Bharat or BC was seeking a credit to his capital account on the theory that repaying funds "borrowed" from Clocktower entitles them to a capital account credit. As to the paying of debts of the corporation, this seems to have been a relatively common practice in this loosely-managed family corporation, but in any event it was not established how Clocktower would go about consenting, except that it was established that BC remained a 50 percent shareholder. Nor was it established what particular amount might be owing to Clocktower on the theory that debts of Clocktower paid by either Bharat or BC would not entitle either Bharat or BC to an offset against sums "borrowed." The issue of the effect of Civil Code section 3337 was not briefed in Clocktower's closing argument.

C. Summary

The statement of decision as originally issued remained unchanged.

DISCUSSION

A. Standard of Review

"On review of a judgment based upon a statement of decision following a bench trial, we resolve any conflict in the evidence and reasonable inferences to be drawn from the facts in support of the determination of the trial court. (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189 [145 Cal.Rptr.3d 128].) Where there is a challenge to the sufficiency of the evidence supporting the judgment, we '"'"consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]'" [Citation.]' (*Ibid.*) '"The substantial evidence [standard of review] applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial." [Citation.]' (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 958 [124 Cal.Rptr.3d 78].) 'The testimony of a single witness may be sufficient to constitute substantial evidence. [Citation.]' (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 969 [150 Cal.Rptr.3d 385].)" (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

As BC and Bharat note, defendants in their opening brief did not specify the standard of review that applies to their various claims on appeal.[4] In their reply brief, however, defendants maintain that each of their claims on appeal raises an error of law that is reviewed de novo.

Because, as noted, defendants concede they are not challenging the sufficiency of the evidence in support of the referee's factual findings and they cannot challenge the referee's resolution of disputed factual issues and credibility determinations, we will review defendants' challenges on appeal de novo, but in light of the facts determined in the statement of decision and the supplement, indulging every reasonable inference supported by those facts and resolving all disputed factual and credibility issues in favor of the judgment. And, we will reject any attempt by defendants to argue or emphasize facts or testimony that the referee expressly or implicitly discounted. We will also reject any claimed legal errors which are based on disputed facts, as all such factual disputes must be resolved in favor of the judgment.

---

[4] BC and Bharat also contend defendants' opening brief and record on appeal are inadequate because defendants' factual statement does not set forth a full and fair recitation of all the relevant evidence and their appendix does not contain many of the submissions made by BC and Bharat, including their closing argument and trial exhibits. Although defendants' brief and record on appeal do appear to be inadequate in certain respects, the respondents' brief and appendix effectively cured any such inadequacies. We will therefore determine the appeal on its merits.

B. Stock Ownership Case

1. Conclusion That No Transfer of BC's Shares Occurred

Defendants contend the trial court's conclusion that no transfer of BC's shares occurred was erroneous as a matter of law. According to defendants: the exhibit 20 minutes constituted an enforceable contract to transfer BC's shares to Suresh; the exhibit 20 minutes and the exhibit 79 loan application were written instruments that were conclusively presumed to be true under Evidence Code section 622; the minutes constituted an evidentiary admission of BC's intent to transfer his shares to Suresh; BC judicially admitted in his second amended complaint that he intended to transfer his shares to Suresh; an endorsement was not required to transfer BC's shares because Clocktower was a closely-held, family corporation and because the Commercial Code section 8304, subdivision (c) endorsement requirement did not apply to voluntary share transfers; and the evidence did not support the referee's finding that, at best, BC made an uncompleted gift.

a. Exhibit 20 Minutes As Contract

In support of their contention that the exhibit 20 minutes constituted a contract, defendants argue that those minutes represented BC's objective manifestation of intent to give Suresh three shares of Clocktower stock and that BC's subjective intent about what he signed was therefore of no consequence. Defendants also maintain that BC's signature on the exhibit 79 loan application showing Suresh as a 25 percent shareholder of

Clocktower was further evidence of BC's objective manifestation of intent to transfer a portion of his shares to Suresh.

Defendants' contention ignores the referee's express findings that BC could not read the exhibit 20 minutes or the exhibit 79 application and that neither document was translated for him before he signed it. Instead, as the referee found, BC routinely signed documents presented to him by Bharat without understanding what he was signing. Moreover, as the referee also expressly found, *BC never agreed to transfer his shares* to anyone during his lifetime and Bharat admitted that he deceived BC into signing exhibits 20 and 79. Those findings negate any suggestion that BC ever objectively manifested an intent to transfer his shares because, as the referee found, he never formed or expressed such an intent.

In essence, defendants are urging us to reweigh the objective evidence of intent on appeal and reach a different conclusion on the intent to transfer issue. But the referee was the sole judge of credibility and he concluded that BC was being truthful when he testified that he did not know what the minutes and loan application meant and that he never told anyone that he had a present, as opposed to future, intent to transfer his shares to Suresh.

b. Evidence Code Section 622

Defendants contend the conclusive presumption in Evidence Code section 622[5] applies to the exhibit 20 minutes and

---

[5] Evidence Code section 622 provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

the exhibit 79 loan application, thereby contractually estopping B.C. from denying the facts recited in those documents concerning his intent to transfer shares to Suresh. According to defendants, the minutes and loan application were "written instrument[s]" as that term is used in section 622 and, as a result, the facts recited therein are conclusively presumed to be true.

"Evidence Code section 622 . . . 'codifies the common law doctrine of "estoppel by contract."' [Citations.]" (*Quintanilla v. Dunkleman* (2005) 133 Cal.App.4th 95, 116.) That doctrine "is based on the principle that parties who have expressed their mutual assent are bound by the contents of the instrument they have signed, and may not thereafter claim that its provisions do not express their intentions or understanding. [Citations.]" (*City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1176.)

As an initial matter, it is not clear that the exhibit 20 minutes or the exhibit 79 loan application are written instruments as that term is used in Evidence Code section 622. As the court explained in *Quintanilla v. Dunkleman, supra,* 133 Cal.App.4th 95, "'the word "instrument," as used in section 622, usually refers to a contract'. . . [although] . . . section 622 has been applied to documents other than contracts, such as a transfer of property (*Estate of Wilson* [(1976)] 64 Cal.App.3d [786,] 801) and an estoppel certificate (*Plaza Freeway Ltd. Partnership v. First Mountain Bank* [(2000)] 81 Cal.App.4th [616,] 628-629)." (*Id.* at p. 117; see also *Plaza Freeway Ltd. Partnership v. First Mountain Bank, supra,* 81 Cal.App.4th at pp. 621-625 [reviewing the different interpretations of "written instrument" as used in various statutes].)

Moreover, even assuming the minutes and loan application were written instruments as that term is used in Evidence Code section 622, that section does not apply to an assertion of fraud or other grounds that invalidate an instrument. (*Citizens Business Bank v. Gevorgian, supra,* 218 Cal.App.4th at p. 625 ["Evidence Code section 622 does not bar an assertion of fraud or other grounds for rescission of a contract or to recitals in an adhesion contract. (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1291 [73 Cal.Rptr.3d 395] [holding plaintiffs are not bound by Evid. Code, § 622 to a recital that they had read a sample copy of a warranty booklet"].) Here, although the referee did not expressly rule that the minutes and loan application were procured by fraud, his findings that Bharat submitted those documents to BC for signature without translating or explaining them supported a reasonable inference that Bharat intentionally deceived BC into signing those documents. Thus, section 622 did not operate to prevent BC from showing that the minutes and loan application were fraudulently procured and did not reflect his true intent.

And, given the findings that BC could not read the documents and they were not translated or explained to him, BC was not subject to the conclusive presumption in Evidence Code section 622. In *Quintanilla v. Dunkleman, supra,* 133 Cal.App.4th 95, the plaintiff patient "was rushed through the admission process without a real opportunity to read the consent form, she was not able to read the language on the form, and she did not understand what procedures were going to be performed upon her . . . ." (*Id.* at p. 117.) The court held that, under such circumstances, "the conclusive presumption of Evidence Code section 622 is inapplicable." (*Ibid.*; see *City of Santa Cruz v. Pacific Gas & Electric Co., supra*, 82 Cal.App.4th at pp. 1176-

1177 [Evid. Code, § 622 "is inapplicable in the procedural circumstances presented here. This is not a situation involving arm's length negotiations marked by the opportunity of both sides 'to accept, reject, or modify the terms of the agreement'"].) Here, the evidence supported a reasonable factual inference that BC had no meaningful opportunity to negotiate or assent to the provisions of either document. Thus, the conclusive presumption in section 622 did not apply to the facts as found by the referee in this case.

The referee found that BC could not and did not understand the meaning and significance of the facts recited in the minutes and the loan application, and that he had been deceived into signing them. As a result, he was not contractually estopped from denying that he ever intended to transfer any of his shares to Suresh.

c. Evidentiary and Judicial Admissions

Defendants argue that, even if the exhibit 20 minutes did not evidence a binding contract, those minutes nevertheless constituted an evidentiary admission by BC concerning his intent to transfer a portion of his shares to Suresh. But even assuming that is correct, the referee presumably weighed that admission against BC's testimony that he never intended to transfer any of his shares during his lifetime and concluded that the evidence preponderated that BC never intended to gift any of his shares during his lifetime. Because we cannot reweigh the evidence or make independent credibility determinations on appeal, we conclude that the trial court did not err when it weighed the objective evidence of BC's intent and made its findings based thereon.

Defendants also contend that, in the second amended complaint, BC made a judicial admission that, on January 1, 2007, he informed Suresh and others that he intended to transfer three shares each to Suresh and Bharat and that his intent to do so was reflected in the exhibit 20 minutes. According to defendants, those judicial admissions were binding on BC and rendered his testimony to the contrary irrelevant.

"'The admission of fact in a pleading is a 'judicial admission. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 [127 Cal.Rptr.2d 436] [(*Valerio*)].) A judicial admission in a pleading is not merely evidence of a fact; it is a conclusive concession of the truth of the matter. (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 218 [51 Cal.Rptr.2d 642].) 'Well pleaded allegations in the complaint are binding on the plaintiff at trial.' (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 455, p. 587.) '[T]he trial court may not ignore a judicial admission in a pleading, but must conclusively deem it true as against the pleader.' (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1155 [138 Cal.Rptr.3d 130].)" (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 187.)

It does not appear from the record of the evidentiary hearing that defendants objected to BC's testimony on the grounds that his pleading admissions prevented him from denying or contradicting them at the evidentiary hearing. Instead, BC was allowed without objection to testify at length about his intent to transfer shares to Suresh and whether he ever told anyone that he intended to transfer or gift any of his shares during his lifetime. Moreover, defendants did not raise the judicial admissions argument in their written closing argument.

Absent such an objection, defendants have forfeited this contention on appeal. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265 ["The forfeiture rule generally applies in all civil and criminal proceedings. . . . The rule is designed to advance efficiency and deter gamesmanship"].)

At oral argument, we asked the parties to submit letter briefs on the forfeiture issue as it had not been briefed. In their letter brief, defendants contend their judicial admissions contention was not forfeited because the binding effect of a judicial admission is a question of substantive law, not evidence, and therefore no objection based on the judicial admission is required in the trial court. In support of this contention, defendants rely heavily on the decision in *Valerio, supra,* 103 Cal.App.4th 1264. In the alternative, defendants argue the binding effect of a judicial admission raises a pure question of law that we have the discretion to consider for the first time on appeal, citing *Ward v. Taggart* (1959) 51 Cal.2d 736.[6]

Defendants' reliance on *Valerio, supra*, 103 Cal.App.4th 1264 is misplaced. In that case, the plaintiff painting subcontractor admitted in his answer to the defendant contractor's cross-complaint the existence of a written agreement with the defendant. (*Id.* at pp. 1267-1268.) The plaintiff also admitted the existence of the agreement in response to requests for admissions. (*Id.* at p. 1268.) In his case management

---

[6] Defendants' letter brief also raises, for the first time, a new issue based on the doctrine of judicial estoppel, arguing that B.C. should be estopped, as a matter of policy, from relying on evidence that contradicts his pleading admissions. Because we did not request briefing on this new issue, we do not address it here.

conference statement, however, the plaintiff took the position that there was no contract and clarified that his claim was for quantum meruit only. (*Ibid.*) In response, the defendant argued in his case management conference statement that the existence of the written contract was not in dispute because the plaintiff had judicially admitted such existence in his answer and responses to requests for admissions. (*Ibid.*) The defendant also advised the trial court that, although no motions in limine were contemplated, an evidentiary dispute would arise at trial if the plaintiff attempted to introduce evidence showing that the contract was unenforceable. (*Id.* at pp. 1268-1269.) The defendant also raised the conclusive effect of the admissions in his trial brief, closing argument, request for statement of decision, and motion for new trial. (*Id.* at pp. 1269-1270.) Nevertheless, the trial court refused to give conclusive effect to the admissions and instead found that there was no contract between the parties. (*Id.* at pp. 1269-1271.)

On appeal, the court in *Valerio, supra*, 103 Cal.App.4th 1264 held that the trial court erred by not giving conclusive effect to the admissions. (*Id.* at pp. 1266, 1267.) In doing so, however, the court in *Valerio* did not address the forfeiture issue raised here because, as explained, the defendant in that case, unlike defendants here, repeatedly asserted the conclusive effect of the judicial admissions in the trial court.

Here, defendants concede that they did not raise the judicial admission issue with the referee. Indeed, as BC points out, defendants pursued a different theory at the evidentiary hearing when they tried to establish through cross-examination that BC's pleadings were not translated or explained to him before he signed them. Thus, the referee was never apprised of

the pleading admissions at issue here, much less asked to give them conclusive effect. By not raising the issue at the evidentiary hearing, defendants deprived both BC and the referee of the opportunity to address it. Instead, defendants allowed BC to testify without objection that he never intended to transfer three of his shares to Suresh and he never gave Bharat permission or authority to create the exhibit 20 minutes. It would therefore be fundamentally unfair to the referee and BC to allow defendants to raise the issue for the first time on appeal.

Because the decision in *Valerio, supra*, 103 Cal.App.4th 1264 does not address the forfeiture issue and because defendants cite no other authority dealing directly with forfeiture in the context of judicial admissions, we reject the contentions based on *Valerio* in their letter brief concerning forfeiture. We also decline to exercise our discretion under *Ward v. Taggart, supra*, 51 Cal.2d 736 to consider the judicial admissions contention for first time on appeal because the issue of whether BC was bound by his judicial admissions is not an issue of public interest or one that involves the proper administration of justice.

d. Irrevocable Gift

Based on the faulty assumption that BC's intent to gift his shares to Suresh was not in dispute because of BC's judicial admissions discussed above, defendants contend the exhibit 20 minutes constituted an irrevocable gift under Civil Code section 1148.[7] But, because defendants' judicial admission contention was forfeited, BC's intent to gift his shares to Suresh was in issue at the evidentiary hearing, and the referee found that,

---

[7] Civil Code section 1148 provides: "A gift, other than a gift in view of impending death, cannot be revoked by the giver."

notwithstanding the minutes, BC did not have an intent to gift any of his shares to anyone. As noted above, defendants do not challenge the sufficiency of the evidence in support of that finding on appeal.

It is well established that a voluntary intent to make a gift is an essential element of a gift. "The elements of a gift are: '(1) competency of the donor to contract; (2) *a voluntary intent on the part of the donor to make a gift*; (3) delivery, either actual or symbolical; (4) acceptance, actual or imputed; (5) complete divestment of all control by the donor; and (6) lack of consideration for the gift.'" (*Burkle v. Burkle* (2006) 141 Cal.App.4th 1029, 1036, fn. 5, italics added.) Absent a showing of a voluntary intent to make a gift, there is no basis upon which to claim that an irrevocable gift was made by BC.

e. Endorsement Requirement

Defendants maintain that, as a matter of law, there was no requirement that BC endorse or deliver the shares prior to the gift being deemed completed. According to defendants, the endorsement requirement in Commercial Code section 8304, subdivision (c)[8] applies only to the sale of certificated shares to a bona fide purchaser for value, whereas the alleged transfer here was a gift between family members. In addition, defendants assert that the endorsement requirement in Clocktower's by-

---

[8] Commercial Code section 8304, subdivision (c) provides: " An endorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the endorsement is on a separate document, until delivery of both the document and the certificate."

laws[9] was not binding because the corporation was a closely-held family business that did not follow or adhere to corporate formalities.

Defendants' assertions concerning the endorsement or delivery issue are misguided because they assume that BC formed and manifested an intent to make a gift of shares to Suresh, but then changed his mind before endorsing or delivering the shares. As discussed, the referee found that BC never intended to make such a gift. Therefore, the issue of whether he completed the gift is irrelevant.

The referee did make an alternative finding that, even if BC had initially intended to make a gift in the future, he did not complete the gift because the shares were not endorsed or delivered. But, the referee also considered the lack of an endorsement or delivery by BC *as evidence* that corroborated BC's stated intent not to transfer any of his shares during his lifetime, i.e., he never agreed or intended to make a gift. Therefore, regardless of whether, as a legal proposition, there was a requirement to endorse or deliver the share certificates, BC's failure to endorse or deliver the share certificates, as a factual matter, supported a reasonable inference that he refused to do so because he never formed the intent to transfer any of his shares during his lifetime.

f. Incomplete Gift

Based on their interpretation of the exhibit 20 minutes and their flawed judicial admissions theory, defendants argue the

---

[9] Clocktower's by-laws also required an endorsement to effect a transfer of Clocktower shares.

referee's finding that BC did not complete the gift of his shares to Suresh was legally erroneous. According to defendants, the minutes reflect that BC surrendered control of his shares by vesting Clocktower's managers with the authority to take all necessary steps to complete the share transfers and BC admitted his present intent to complete the gift in his second amended complaint.

As discussed above, the referee's findings that BC did not read or understand the minutes forecloses any argument that he nevertheless intended to empower Clocktower's managers to divest him of his shares. Similarly, defendants' failure to object to BC's testimony about the intent issue—on the grounds that it was contrary to his judicial admissions—forfeited any contention that BC was bound by those pleading admissions. Absent such an objection, the referee properly heard and considered the parties respective objective evidence on the intent issue and made findings favorable to BC, i.e., BC did not by the exhibit 20 minutes empower the Clocktower managers to transfer his shares and did not by those minutes manifest a present intent to transfer shares to Suresh. And, those findings were concededly supported by substantial evidence. Accordingly, the referee did not err by concluding that the claimed gift had not been completed.

2. Conclusion That Bharat Was Not BC's Agent

Defendants maintain that referee erred when he found that Bharat was not acting as BC's actual or ostensible agent when he procured BC's signature on the exhibit 20 minutes and exhibit 79 loan application and submitted those documents to Clocktower's directors and the construction lender. According to defendants,

the undisputed evidence established that BC relied exclusively on Bharat to handle all BC's business dealings, including all matters relating to the development and operation of Clocktower. As a result, defendants argue, the minutes and loan application were matters within the broad scope of Bharat's actual agency and, in any event, BC held Bharat out as BC's ostensible agent by allowing him to act on BC's behalf when dealing with third parties like Suresh and the construction lender.

"An agent is one who represents another, called the principal, in dealing with third persons." (Civ. Code, § 2295.) "An agency is either actual or ostensible." (Civ. Code, § 2298.) "Actual agency typically arises by express agreement. (See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency & Employment, § 36, pp. 49-50; see also, e.g., *Naify v. Pacific Indemnity Co.* (1938) 11 Cal.2d 5, 12 [76 P.2d 663] [actual agency must rest on agreement or consent].) It also 'may be implied from the conduct of the parties. [Citation.]' (*Thayer v. Pacific Elec. Ry. Co.* (1961) 55 Cal.2d 430, 438 [11 Cal.Rptr. 560, 360 P.2d 56].)" (*van't Rood v. County of Santa Clara* (2004) 113 Cal.App.4th 549, 571.)

"The Civil Code recognizes that agency, and the authority conferred upon an agent, may be ostensible as well as actual ([Civil Code,] §§ 2298 and 2315). 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' ([Civil Code,] § 2300.) 'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.' ([Civil Code,] § 2317.) 'A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who

have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.' ([Civil Code,] § 2334.) 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence. [Citation.]' (*Hill v. Citizens Nat. Trust & Sav. Bk.* (1937) 9 Cal.2d 172, 176 [69 P.2d 853]. [Citations.] [¶] . . . [¶] "'When the conduct of the principal warrants further inquiry or when the third party is dealing with an assumed agent, the third party is bound at his peril, if he would hold the principal liable, to ascertain not only the fact of the agency but the nature and extent of the authority. [Citations.]'" [Citations.]" (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399-400.)

The referee found that, although BC empowered Bharat to act on BC's behalf concerning BC's business dealings generally, BC did not by word or conduct agree to empower Bharat to transfer any of his shares. That finding, which was concededly supported by sufficient evidence, defeats any argument that Bharat was BC's actual agent.

On the ostensible authority issue, Suresh admitted that he did not pay attention to the corporation's paperwork and therefore could not have relied on either the minutes or the loan application to his detriment. And, as explained above, when a third-party, like Suresh, deals with an assumed agent, that party has an affirmative duty to make a reasonable inquiry into the

fact and scope of the agency. Here, there was no evidence that Suresh made any inquiry of BC concerning Bharat's authority to bind BC generally, much less Bharat's authority to gift BC's shares.

3. Failure to Rule on Preexisting Family Agreement

Defendants assert that the referee erred by failing to determine whether there was a preexisting family agreement concerning Suresh's ownership interest in Clocktower. They reason that, even if the exhibit 20 minutes and the exhibit 79 loan application did not effect a transfer of BC's shares to Suresh, those documents were consistent with and evidence of the oral agreement about which Suresh testified and under which he was allegedly given a 25 percent ownership interest in Clocktower. Although the referee ruled that the oral agreement raised a new legal and factual theory that had not been pleaded, defendants maintain the oral agreement was "plainly raised" by Suresh's cross-complaint against Bharat and the trial evidence, including the evidence that Clocktower was a family-run business that did not adhere to corporate formalities and Suresh's testimony that the corporate paperwork did not reflect reality.

Contrary to defendants' assertion, Suresh's cross-complaint did not "plainly raise" the issue of whether there was a preexisting oral agreement that BC held his Clocktower shares as a family investment for the benefit of his sons, Suresh and Bharat. The cross-complaint asserted one tort cause of action against Bharat for interference with contractual relations. The contract with which Bharat allegedly interfered was the one allegedly reflected in the exhibit 20 minutes under which BC

transferred three of his shares to Suresh. According to Suresh's cross-complaint, "[Bharat] intended to disrupt the contractual relationship memorialized in [exhibit 20] . . . ." There is no mention in the cross-complaint of a separate and distinct oral agreement under which Suresh owned 25 percent of Clocktower. Instead, that alleged agreement first came to light at the evidentiary hearing when Suresh claimed that, notwithstanding the exhibit 20 minutes which were created in November 2007, he had owned 25 percent of Clocktower from the outset, i.e., since it was formed in 1993.

The alleged oral agreement upon which this contention is based raised a new legal theory, based on different facts from those pleaded in the cross-complaint. As such, it was outside the scope of the issues to be determined by the referee under the parties' stipulation, which specified that the "[r]eferee shall proceed using the existing pleadings and documentation." Therefore, the referee did not fail to decide an issue that had been referred to him and instead correctly concluded that the issue of a preexisting oral agreement was not properly before him.

4. Failure to Rule on Estoppel

Defendants contend the referee erred when he rejected Suresh's assertion that BC was estopped from denying that Suresh had an ownership interest in Clocktower. According to defendants, BC voluntarily accepted Suresh's contributions to Clocktower over the years, including two loan guarantees, and Bharat, as BC's agent, also accepted Suresh's contributions to Clocktower, provided Suresh with distributions that were consistent with an ownership interest, and submitted an

application to the construction lender confirming Suresh's 25 percent ownership of Clocktower.

Defendants base their estoppel argument on Evidence Code section 623 which provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

Defendants' estoppel theory fails because the referee found that BC did not read or understand the documents on which the estoppel is based and therefore could not have intentionally or deliberately misled Suresh concerning the contents of those documents. Similarly, because the referee found that Bharat was not acting as BC's agent concerning the purported stock transfer, BC cannot be estopped based on any conduct or statements by Bharat to Suresh concerning stock ownership. And, contrary to defendants' assertion, the referee implicitly concluded that BC did not engage in any affirmative conduct or make any statements upon which Suresh could have relied to his detriment. Thus, the referee did not err in rejecting defendants' estoppel claim.

Defendants also assert the referee was required to make specific findings on the estoppel and other issues, but failed to do so. That failure, defendants argue, constituted prejudicial error that requires reversal.

As explained in detail below, because the parties stipulated to a referee under section 638(a),[10] the referee was required to

---

[10] Section 638(a) provides, in pertinent part: "A referee may be appointed upon the agreement of the parties . . . : [¶] (a) To hear and determine any or all of the issues in an action or

"report a statement of decision." The requirements for a statement of decision are set forth in Code of Civil Procedure section 632.[11] As section 632 expressly provides, such a statement does not require findings of fact and conclusions of law. (*Yield Dynamics Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 559 ["[I]t is settled that the trial court need not, in a statement of decision, 'address all the legal and factual issues raised by the parties.' [Citation.] It 'is required only to set out ultimate findings rather than evidentiary ones'"].)

Although the parties' stipulation to a general reference under section 638(a) contained the phrase "findings of fact and conclusions of law," the other references in the stipulation to section 638(a) and to the term "statement of decision" make it clear that detailed evidentiary findings were not required. Thus, the referee did not err by failing to make detailed evidentiary findings on the estoppel issue. A fair reading of the statement of decision and the supplement demonstrates that the referee provided a reasoned explanation of the factual and legal bases for

---

proceeding, whether of fact or of law, and to *report a statement of decision*." (Italics added.)

[11] Code of Civil Procedure section 632 provides, in pertinent part: "In superior courts, upon the trial of a question of fact by the court, *written findings of fact and conclusions of law shall not be required.* The court shall issue *a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues* at trial upon the request of any party appearing at the trial. . . . The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision." (Italics added.)

his rulings, including a ruling on the estoppel issue, that were consistent with the requirements of section 638(a) and Code of Civil Procedure section 632.

5. Jurisdiction to Decide Stock Ownership Issue

Defendants contend that the referee lacked jurisdiction to decide the stock ownership issue. According to defendants, BC's declaratory relief action seeking a determination of the stock ownership dispute was brought as a derivative action on behalf of Clocktower, but the declaration sought was, in fact, an individual claim that BC did not plead. Therefore, defendants argue, because the referee's jurisdiction was limited to adjudicating claims that were pleaded prior to the reference, he had no power to determine BC's individual claim, as it was not pleaded.

As an initial matter, BC originally filed this action, *including his declaratory relief claim,* as an individual. Defendants then demurred to that complaint on the grounds that all the claims pleaded therein, including the declaratory relief claim, were corporate claims, not individual ones, that should have been brought as a derivative action in BC's name, but on behalf of the corporation. The trial court sustained the demurrer and ordered BC to file an amended pleading clarifying that he was pursuing a shareholders derivative action, not a direct action. In response, BC filed an amended complaint that recast the claims in the original complaint as derivative claims. Thus, as to the declaratory relief claim, defendants were on notice from the outset that, regardless of whether that claim was individual or derivative, BC intended to litigate the stock ownership issue in this action by seeking a declaration of the parties' respective rights and obligations in relationship to that dispute.

Moreover, as noted, when the parties stipulated to have the issues framed by the pleading determined by a referee, they did so pursuant to section 638(a) which provides that the referee has the power to "hear and determine *any or all of the issues in an action* or proceeding, whether of fact or of law, and to report a statement of decision." (Italics added.)

"'A voluntary reference may be a *special reference*, simply to ascertain some fact [citation.], or a *general reference* "[t]o try *any or all of the issues* in an action or proceeding, whether *of fact or of law,* and to report a *statement of decision thereon*.' [Citations.]" (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 449-450.) "In a judicial reference, a pending court action is sent to a referee for hearing, determination and a report back to the court. A general reference directs the referee to try *all issues in the action*. The hearing is conducted under the rules of evidence applicable to judicial proceedings. In a general reference, the referee prepares a statement of decision that stands as the decision of the court and is reviewable as if the court had rendered it. The primary effect of such a reference is to require trial by a referee and not by a court or jury. (*Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 955-956 [32 Cal.Rptr.3d 411].)" (*Treo @ Kettner Homeowners Association v. Superior Court* (2008) 166 Cal.App.4th 1055, 1060-1061, italics added.)

"A special reference, in contrast, is limited to specific fact determinations. (*Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1522-1523 [76 Cal.Rptr.2d 322].) A court may appoint a referee without the consent of the parties '[w]hen a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.' ([Code Civ. Proc.,] § 639, subd. (a)(3).)

Although the findings and recommendations made [by a referee] at special reference hearing are advisory and not binding, great weight is given to the [referee's] opinion. (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 176 [110 Cal.Rptr.2d 111].)" (*Settlemire v. Superior Court* (2003) 105 Cal.App.4th 666, 671.)

As the referee noted, all the parties necessary to the determination of the stock ownership issue were at the evidentiary hearing represented by counsel. The referee heard all the testimony and considered all the exhibits the parties submitted in support of their respective positions on the stock ownership issue. The parties then submitted written closing arguments and the referee made a reasoned determination in the statement of decision that BC owned 12 shares, or 50 percent, of Clocktower's stock. Under these circumstances, the referee's jurisdiction to hear and determine the stock ownership issue was evident.

In essence, defendants are grounding their argument on the "derivative" label attached to the declaratory relief cause of action, but not on the gravamen of that claim, which was to resolve the stock ownership issue. Because the referee, acting in place of the trial court, had broad discretion to allow an amendment to the pleading to conform it to the proof adduced at the evidentiary hearing, he clearly had the jurisdiction to determine the issue, regardless of whether the claim was styled as a derivative or individual one. Moreover, any variance between the pleading and the proof is deemed immaterial, unless defendants can demonstrate that they were prejudiced by such variance.

A trial court may allow a pleading to be amended at any time up to and including trial. (Code Civ. Proc., §§ 473, subd. (a)(1), 576.) "'The basic rule applicable to amendments to conform to proof is that *the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded.*'" (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 910, italics added.) The trial court has broad discretion to grant leave to amend, and "'[t]hus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record.'"" (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242; see also Code Civ. Proc., §§ 469 ["[n]o variation between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits"], 576 ["[a]ny judge, at any time before or after commencement of trial, in the furtherance of justice . . . may allow the amendment of any pleading"]; *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 [amendments to conform to proof rest largely in the discretion of the trial court, but are properly "allowed with great liberality"]; *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1042 ["[t]he basic rule from civil law . . . is that amendments to conform to proof are favored, and should not be denied unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice"].)

Here, whether labeled as derivative or direct, the issue framed by the pleadings for decision by the referee was the nature and extent of BC's stock ownership in Clocktower, and the evidence and legal arguments relevant to that hotly disputed

issue were the same, regardless of the label. And, defendants do not contend, much less demonstrate, they were prejudiced by the derivative label attached to the pleading *at their request*. Therefore, based on the parties' stipulation under section 638(a)—which empowered the referee to determine *all issues* fairly raised by the pleadings—the referee was expressly vested with jurisdiction to hear and determine the stock ownership issue.

6. Failure to Rule on Other Issues or Make Detailed Findings of Fact and Conclusions of Law

Defendants maintain that, pursuant to the parties' stipulation to appoint a referee under section 638(a), the referee was required to make detailed findings of fact and conclusions of law on various issues, but failed to do so. As defendants read the stipulation, the referee's failure to act in accordance therewith constituted an act in excess of his jurisdiction which warrants reversal. Among other things, defendants contend that the referee refused to make specific findings on certain issues because he deemed them hypothetical or beyond the scope of the litigation, and refused to make such detailed findings on other issues, ruling instead that the issues were rejected for "the reasons stated above."

"[I]t is settled that the trial court need not, in a statement to decision, 'address all the legal and factual issues raised by the parties.' (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125 [94 Cal.Rptr.2d 579].) It 'is required only to set out ultimate findings rather than evidentiary ones' (*Ibid.*) "'[U]ltimate fact[]'" is a slippery term, but in general it refers to a

core fact, such as an element of a claim or defense, without which the claim or defense must fail. (See Black's Law Dict. (8th ed. 2004) p. 629 ['A fact essential to the claim or the defense.—Also termed *elemental fact*; *principal fact*.'].) It is distinguished conceptually from 'evidentiary facts' and 'conclusions of law.' (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 339, pp. 436-437.)" (*Yield Dynamics, Inc. v. TEA Systems Corp., supra,* 154 Cal.App.4th at p. 559.)

As noted above in connection with defendants' estoppel assertion, the parties' stipulation was expressly made under section 638(a), which requires a "statement of decision." Section 632 defines a statement of decision and expressly provides that findings of fact and conclusions of law are not required. The parties' stipulation recognized that a statement of decision was required by using that term twice. In paragraph 1, the parties agreed, consistent with the requirements of section 638(a), that the referee would "report a statement of decision." In paragraph 7, the parties repeated that the referee "shall issue a statement of decision . . . ." Nevertheless, in that same paragraph, the parties made a confusing and internally inconsistent reference to "findings of fact and conclusions of law," without defining what that term means in the context of the stipulation as a whole or expressly providing that such findings of fact and conclusions of law would be in lieu of the statutorily required statement of decision.

Because the terms "statement of decision" and "findings of fact and conclusions of law" appear contradictory and because reading the stipulation to require detailed findings of fact and conclusions of law would be inconsistent with the statutory scheme under which the parties stipulated, we conclude that the

statutory language controls the interpretation of the stipulation and, in light of the express statutory mandates, the referee was not required to make detailed findings of fact and conclusions of law. Therefore, the referee's statement of decision and supplement adequately disposed of all the issues that were referred to him and otherwise complied with his obligations under sections 638(a) and the trial court's order appointing him to act as referee.

C. Conversion Case

Clocktower argues the referee erred by failing to find that BC and Bharat converted funds that belonged to Clocktower and failing to award Clocktower damages for that conversion. According to Clocktower, repayment of converted funds is not a defense to conversion and Clocktower was entitled to an award of interest as damages. Clocktower also contends BC and Bharat failed to plead repayment as an affirmative defense and therefore they were not entitled to rely on that defense at the evidentiary hearing.

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) *damages*. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. [Citations.]' (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066 [80

Cal.Rptr.2d 704].) The basis of a conversion action "'rests upon the unwarranted interference by [the] defendant with the dominion over the property of the plaintiff *from which injury to the latter results*. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action.'" [Citations.]' (*Ibid.*)" (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387.)

The referee ruled that because Clocktower had failed to prove an essential element of conversion—damages—it was not entitled to any recovery on that claim. Because the referee disposed of the conversion claim on the damages issue, he was not, as Clocktower contends, also required to rule on whether a conversion had occurred. On the damages element, the referee found that Clocktower had failed to prove that BC and Bharat had taken more money out of the corporation than they had repaid and that it was likely they repaid more than they had taken out. The referee also found that Clocktower had failed to prove the amount, if any, of interest that Clocktower had incurred as damages. Thus, contrary to Clocktower's assertion, it was not entitled to interest as damages because it failed to prove any such damage at the evidentiary hearing. Given the referee's factual findings on the conversion claim, he did not err as Clocktower contends.

Clocktower's assertion regarding the failure to plead "repayment" as an affirmative defense is baseless. The issue of damages, or a lack thereof, was before the referee as part of the conversion claim because it was an essential element of that claim. BC and Bharat denied that Clocktower had suffered any damages on the conversion claim in their answers, thereby making the element of damages an issue in dispute between the

parties. Thus, BC and Bharat were entitled to put on evidence showing that Clocktower had not suffered any damages, without the necessity of pleading "repayment" as an affirmative defense.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

---

* Judge of the Superior Court of the County of Los Angeles, appointed by the Chief Justice pursuant to article VI, section 6 of the California Constitution.